IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MR.JUSTICE M.JAICHANDREN

O.S.A.Nos.210 ,211,213 & 224 of 2001

M.Narayanaswamy .... Appellant in all O.S.As.

vs.

M.Bakthavatsalam .... Respondent in
O.S.A.Nos.210,211 and 213
O.S.A.224- Respondent Nil

For appellant : Mr.M.Narayanasamy
(party in person) in all cases

For respondent : Mr.P.B.Balaji in all cases

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Original Side Appeal No.210 of 2001, has been preferred under order XXXVI Rule 1 of O.S. Rules r/w Cl-15 of Letters patent against the Judgment and decretal order, dated 28.01.2000 , passed by the learned Single Judge in Application No.22 of 1999, in Testamentary Original Suit.No.10 of 1998.

Original Side Appeal No.211 of 2001, has been preferred under order XXXVI Rule 1 of O.S. Rules r/w Cl-15 of Letters patent against the Judgment and decretal order, dated 28.01.2000 , passed by the learned Single Judge in Application No.236 of 2000, in Testamentary Original Suit.No.10 of 1998.

Original Side Appeal No.213 of 2001, has been preferred under order XXXVI Rule 1 of O.S. Rules r/w Cl-15 of Letters patent against the Judgment and decretal order, dated 28.01.2000 , passed by the learned Single Judge in Application No.3352 of 1998, in Testamentary Original Suit.No.10 of 1998.

Original Side Appeal No.224 of 2001, has been preferred under order XXXVI Rule 1 of O.S. Rules r/w Cl-15 of Letters patent against the order in Application No.747 of 2000, in O.P.SR.530 of 1999, dated 03.03.2000.

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COMMON JUDGMENT

M.JAICHANDREN.J,

Heard the appellant appearing as party-in-person as well as the learned counsel for the respondent. By consent, all the appeals have been taken up together for hearing and a common judgment is passed.

2. The brief facts common to all the Original Side Appeal Nos.210, 211, 213 and 224 of 2001 are as follows:-

The appellant and the respondent are brothers, being sons of late Achanna Chetty (However, the appellant claims that the respondent had been given away in adoption). Late Achanna Chetty had executed a Will on 11.06.1990, in favour of both the appellant and the respondent herein. The respondent had filed O.P.No.453 of 1997 for probating the said Will, dated 11.06.1990. Due to the objections raised by the appellant herein, with regard to the grant of probate to the respondent, the Original Petition No.453 of 1997, was converted into a Testamentary Original Suit., and the same is pending on the file of this court in its Original Side as Testamentary Original Suit.No.10 of 1998. Pending the Testamentary Original Suit and after examination in chief as PW.1, the appellant has filed several applications in O.S.Nos.3350,3351,3352,3353,3355 of 1998 and also application Nos.22 of 1999 and 236 of 2000. The learned single Judge after hearing both the parties had dismissed all the applications by a common order, dated 28.01.2000. Against the common order, dated 28.01.2000, dismissing the applications the appellant has filed the present appeals O.S.A.NOs.210, 211 and 213 of 2001. Connected O.S.A.No.224 of 2001 has been filed against the order dated 3.3.2000 in Application No.747 of 2000 in O.P.SR.No.530 of 1999. However, the appellant has chosen not to press O.S.A. Nos.212 and 214 of 2001.

3. O.S.A.No.210 of 2001 has been preferred against the order passed in application No.22 of 1999 which had been filed for a direction to the respondent to deposit the arrears of rent up-to-date and future rents into Court. The appellant had contended before the learned single Judge that the respondent was a tenant and that he had agreed to pay Rs.2,000/- per month and that until probate was granted to the respondent he should pay the rents into Court.

4. On the other hand, the respondent had contended that he is the own brother of the appellant and was never a tenant in the said property and therefore, there was no question of payment of rent. The appellant had filed R.C.O.P.No.594 of 1992 against the respondent, as if the respondent was a tenant under him. In the

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said Rent Control Proceedings, he had taken out an application under Section 11 (4) of the Rent Control Act, to direct the respondent to pay the entire arrears of rent. The learned Rent Controller had found that there was no landlord and tenant relationship and therefore, the application was dismissed. Against the said order, the appellant had filed an appeal in R.C.A.No.319 of 1998. The Appellate Authority had allowed the appeal. Challenging the order, the present respondent had moved this Court in C.R.P.No.1775 of 2001. By an order, dated 01.03.2002, the Civil Revision Petition was allowed, restoring the order of the learned Rent Controller, holding that there was no landlord and tenant relationship. The main R.C.O.P.No.594 of 1992 had also been dismissed. The respondent had always been a co-owner and not a tenant under the appellant and therefore, the learned single Judge had dismissed the application for a direction to the respondent to deposit the rents into the Court.

5. The learned single Judge had dismissed the application No.22 of 1999 based on the contentions raised by the respondent therein that he is the own brother of the appellant and that he was never tenant in the property. It has also been noted that the landlord tenant relationship had not been established as claimed by the appellant as found by the rent control in R.C.O.P.No.594 of 1992 which was confirmed by this Court in C.R.P.No.1775 of 2001 by order, dated 01.03.2002. With regard to the last 'Will' and 'testament' alleged by the appellant and the allegation that the respondent was given in an adoption had to be proved at the time of trial in Testamentary Original Suit.No.10 of 1998 pending before this Court. Based on the considerations, the learned single Judge had dismissed the application.

6. In the written submissions made by the appellant in O.S.A.No.210 of 2001 he has stated that the respondent was given in adoption by his father late M.Achanna Chetty by Datta Homam to his own brother late M.Lakshmiah Chetty, as he had no male issues. However, the said adoption had been suppressed in some of the documents. Such documents are being misused by the respondent to suit his needs. However, in many of the documents he had signed as though he is the son of late M.Lakshmiah Chetty. In order to usurp the properties from the natural family, the respondent had prepared a Will in the name of late M.Achanna Chetty and he had obtained his signatures in the Will by coercion and had registered the Will to give it a colour of authenticity. Many of the facts have been suppressed in the Will. The alleged testator M.Achanna Chetty had cancelled the said coercive Will and had also executed his own Will. In such circumstances, the respondent could not have become the owner of the portion in which he is residing in door.No.15 (New), Bhimanna Second Street, Chennai-18, unless and until he probates his Will. The appellant had prayed that this Court ought to allow

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O.S.A.No.210 of 2001, by directing the respondent to deposit the rents in Court at Rs.2,000/- per month collected from 01.12.1991 till the date of his alleged Will.

7. We have heard the party-in-person as well as the learned counsel appearing for the respondent on these aspects and we have also perused the written submissions filed by both sides. The conclusion given by the learned single Judge can only be considered as prima facie conclusion. As rightly observed by the learned single Judge, the plea of the present appellant that the present respondent had been given in adoption can be gone into at the time of the trial and at this stage it cannot be said that the respondent is a tenant and not a co-owner as claimed by him. Therefore, there is nothing to interfere with the discretionary order passed by the learned single Judge on this aspect. O.S.A.No.210 of 2001 is therefore liable to be dismissed.

8. O.S.A.No.211 of 2001 has been preferred against the order in Application No.236 of 2000. The said application was filed by the appellant for suspending the evidence of PW.1 and for taking up the pending applications filed by the appellant for disposal. The learned single Judge has passed an order dismissing the same, since all the interlocutory applications were taken up for disposal and disposed of by the same common order. It is stated by the respondent that the above mentioned application had become infructuous since all the interlocutory applications taken out by the appellant were disposed of by a common order as desired by the appellant.

9. With regard to O.S.A.No.211 of 2001, the appellant seeks to set aside the order passed by the learned single Judge in application No.236 of 2000 in Testamentary Original Suit.No.10 of 1998. He has prayed that this Court ought to allow the appeal in order to enable him to examine the written statement and the two index documents.

9. Even though in the written submission filed by the appellant it is stated that such application was filed to examine the written statement and the two index documents, on a careful verification, we find that the application was filed only for taking of all the Interlocutory Applications before completion of the evidence of P.W.1 and before recording other evidence. Learned single Judge observed that all those Interlocutory Applications were being considered in the common order and, therefore, the application was liable to be dismissed. Since all the Interlocutory Applications were considered, such Appln.No.236 of 2000 had actually become infructuous and accordingly we do not find anything to interfere with the order relating to Appln.No.236 of 2000. Such appeal is therefore liable to be dismissed.

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10. The appeal O.S.A.No.213 of 2001, has been preferred against the order in application No.3352 of 1998, which had been filed for a direction to the respondent to deposit the entire rents up-to-date to the credit of Testamentary Original Suit.No.10 of 1998. The application had been filed to direct the respondent to deposit the rents he was collecting from the tenants. Such Application No.3352 of 1998 had been rejected on the ground that the parties are equally placed and the appellant cannot seek for a direction to deposit the rents, when he is also collecting rents from the tenants in the property and enjoying the same.

11. In O.S.A.No.213 of 2001, the appellant has contended that the respondent had started collecting rents from November,1991, and he had filed the application No.3352 of 1998, for a direction to the respondent to deposit in Court the illegally collected rents from the tenants. Therefore, he had prayed that this Court ought to direct the respondent to deposit the rents collected from November,1991 to 31.01.2000, amounting to Rs.2,13,400/-.

12. He submitted that in fact he is not collecting rent from anybody and therefore the learned single Judge should not have rejected the application for issuing a direction to the respondent for depositing the rent collected by the respondent.

13. Even assuming that no rent is being collected by the appellant and the rent is being collected by the respondent, it would not be appropriate to issue any direction to the respondent to deposit the rent before deciding the main questions raised in the Testamentary Original Suit. The question regarding liability of the respondent to refund any amount would obviously depend upon the result in Testamentary Original Suit., and, therefore, at this stage it would be premature to give any such direction. If, ultimately it is found that the respondent is liable to pay any amount to the appellant or to refund any rent collected, necessary direction can be issued at the time of final disposal of the Testamentary Original Suit. Therefore, we do not find any scope to interfere with the discretionary order passed by the learned single Judge on this aspect. This appeal is therefore liable to be dismissed.

14. O.S.A.No.224 of 2001, has been filed against the order in Application No.747 of 2000 in O.P.SR.No.530 of 1999. The said application has been filed by the appellant producing an alleged "Will" stating that it is the last "Will" and that it was valid even at the initial stage. The application had been dismissed by the learned single Judge by his order, dated 03.03.2000. The learned single Judge had dismissed the said application on the ground that it was bereft of details an it is merely stated that the originals

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are misplaced and therefore certified and attested copies have to be accepted. The learned single Judge observed that there was suppression of some material facts.

15. The appellant's specific case is that the "Will" sought to be probated by the respondent in Testamentary Original Suit.No.10 of 1998 is not the last "Will" and Testament and that there was another "Will" executed by his father, dated 28.11.1991, which alone is the last "Will" and Testament.

16. It is the case of the respondent that the appellant has sought to probate an alleged "Will" of late Achanna Chetty without producing the original "Will" or an authenticated certified copy of the same.

17. On going through the materials on record, we find the present appellant has purported to file a petition under Section 232 and 276 of the Indian Succession Act for issuance of Letters of Administration. In such application, it was claimed that the deceased Achanna Chetty had executed his last will on 4.9.1991 at Gudiyattam, which was misplaced by his Counsel and the deceased had executed similar Will dated 28.11.1991 substituting the missing Will and later on the missing Will dated 4.9.1991 was also traced. The appellant had prayed for issuance of Letters of Administration to the Wills annexed in Docket 1 and 2 dated 4.9.1991 in certified copy and dated 28.11.1991 in Attested copy. This application was numbered as O.P.SR.No.530 of 1999 and by order dated 3.3.2000, the learned single Judge has passed an order stating that the application cannot be entertained. The grounds indicated by the learned single Judge are to the effect that the petition is bereft of details, the applicant's brother had filed Original Petition for probate, which had not been mentioned in the petition and further that the affidavit is vague. Such an order was passed at the SR stage, even before issuing any notice to the present respondent.

18. In our considered opinion, it was not the proper stage to reject such application in such a summary fashion without giving any opportunity to the present appellant to prove the case. The appellant was claiming that the deceased had executed the Wills subsequently. In our considered opinion, the Original Petition should have been numbered and the appellant should have been given an opportunity to prove his case by adducing evidence. Since such Original Petition has been rejected at the SR stage, such order is set aside and it is directed that such proceedings should be numbered and shall be taken up for disposal in accordance with law along with the probate proceedings filed by the present respondent. It is, however, made clear that our present order setting aside the order, dated 3.3.2000, should not be construed as expressing any opinion on the merits of the case and such matter has to be

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considered in accordance with law. Therefore, O.S.A.No.224 of 2001 is allowed, subject to the directions and observations made above.

19. In the result, OSA.Nos.210, 211 and 213 of 2001 are dismissed and OSA.No.224 of 2001 is allowed to the extent and subject to the observations and directions indicated. Hearing of the matters may be expedited. There would be no order as to costs in all the appeals.

Ssm

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Sub Asst Registrar,
Original Side,
High Court, Madras.

2. The Section Officer,
VR Section, High Court, Madras

VC(CO)
SR/2.11.2006

COMMON JUDGMENT IN O.S.A.Nos.
210 ,211,213 & 224 of 2001

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